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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

NEAL BIENICK WARREN,

Defendant and Appellant.

A152902

(Del Norte County  
Super. Ct. No. CRF179273)

A jury convicted defendant Neal Bienick Warren of one count of second-degree burglary. (Pen. Code, § 459.<sup>1</sup>) On appeal, defendant contends his conviction should be reversed because the jury should not have heard: (1) testimony by a sheriff's sergeant relating to two stolen vehicles and to drug addict profiling; and (2) his allegedly coerced admissions during an interrogation by two sheriff's deputies. We disagree and affirm the judgment.

**FACTUAL AND PROCEDURAL BACKGROUND**

As relevant here, the evidence at trial included the following.

On September 19, 2016, Deputy Sheriff Neal Oilar responded to a report that a deceased person was in a Crescent City residence and that people were taking things from the home. Oilar entered Deborah Fillman's locked home through an open bedroom window, where he found Fillman dead on the floor. The room appeared to have been ransacked. Fillman's Honda vehicle was not at the residence, and there were exposed

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<sup>1</sup> All statutory references are to this code unless otherwise indicated.

cables under the living room television. Although the deputies initially investigated the case as a homicide, the autopsy ultimately revealed, months later, that Fillman had died of natural causes.

On September 20, 2016, officers stopped Robert Sinnott Jones (Sinnott) and Tabitha (his girlfriend) in Fillman's Honda in Eureka. Sinnott was arrested. A lighter bearing the name "Neal" was found on the floorboard of the Honda.

On September 21, 2016, Sergeant Richard Griffin stopped defendant in Crescent City as he started to enter a blue Ford truck at a gas station. Defendant was arrested as a main suspect in the Fillman homicide investigation, which was ongoing at the time, and on an outstanding warrant. A prescription bottle containing 19 morphine pills was found in defendant's pocket with the label removed. On his person, defendant also had keys to the Fillman residence, to Fillman's Honda, and to the Ford truck. It was later determined that the Ford truck had been stolen from a storage facility in Crescent City, but it was not known how the vehicle came into defendant's possession.

Pursuant to a warrant, the deputies searched the motorhome where defendant was living. They found the following items taken from Fillman's house: a weed trimmer, an Atari game console, a spoon with blue residue and hypodermic needles, a television, a blue bag with Fillman's prescription bottles containing hydrocodone and other pills, some marijuana, 12 other prescription bottles belonging to Fillman that contained various pills and medications, and a purse containing a \$500 check made payable to Fillman. An investigation indicated the motorhome had been stolen from a storage facility in Del Norte County the previous year and was registered to a Florida owner.

The jury was shown a videotaped interrogation of defendant that was conducted three hours after his arrest. After being advised of his *Miranda* rights at the outset of the interrogation, defendant admitted he entered the Fillman house through a window, saw Fillman's body, ate ice cream, and got her prescription pills. Consistent with statements that Sinnott gave during his interview with deputies, defendant stated that he went to Fillman's house for drugs, then left and returned to Fillman's house with Sinnott to take items.

Defendant took the stand and testified to the following. Defendant was best friends with Fillman's husband Steve, who died in 2015, and he had promised Steve he would look after Fillman. Defendant claimed he went to Fillman's house to check on her and also to buy pills because he and his friends were sick. When no one answered his knocking at the front door, defendant crawled into an open bedroom window and found Fillman dead on the floor. Defendant was "tripping" and "couldn't handle it," so he ate ice cream to soothe his stomach. He saw a pill bottle on a table and grabbed it on his way out. Defendant denied entering Fillman's house with the intent of stealing.

Defendant explained that, upon exiting Fillman's house, he saw Sinnott and asked him for help with a dead body. While Sinnott went into Fillman's house, defendant used drugs in the motorhome, which was parked out front. Defendant then obtained Fillman's dog from Sinnott and took off after telling Amber (defendant's girlfriend) to bring the motorhome to "Larry's" house. Sometime later at Larry's place, defendant entered the motorhome and saw an Atari and a television inside that he had not seen there before. He denied taking the Atari from Fillman's house and believed either Sinnott, Tabitha, or Amber was responsible. The last time defendant saw Fillman's Honda was in Eureka where Sinnott had the car. Defendant may have left his lighter in the Honda when he previously drove Fillman in her car.

Defendant testified the motorhome was Amber's, and she may have obtained it from another man. Defendant borrowed the Ford truck from Sinnott and denied knowing it was reported stolen.

Defendant also testified he was "sick and delusional" when Sergeant Griffin interrogated him. Defendant couldn't think straight, and his skin was crawling.

A jury convicted defendant of second-degree burglary and found true two prior felony conviction allegations and one prior prison term allegation. The trial court sentenced him to state prison for an aggregate term of seven years and imposed various statutory fines.

## DISCUSSION

### A. Evidence of the Stolen Vehicles and Drug Addict Testimony

Defendant claims his trial counsel was ineffective in failing to object to portions of Sergeant Griffin's testimony that purportedly connected defendant to the theft of the motorhome where he lived and the theft of the Ford truck parked at the gas station. In particular, defendant points to Griffin's testimony that after the motorhome was seized in connection with this case and transported to the sheriff's storage facility, and after defendant's temporary release from custody, it was "extremely bold" for defendant to show up to the storage facility to pick up a stolen motorhome. In defendant's view, Griffin's testimony regarding the motorhome and the Ford truck was irrelevant to the charged burglary and highly prejudicial.

To prevail on a claim of ineffective assistance of counsel, a defendant must show "both deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of a different outcome." (*People v. Jones* (1998) 17 Cal.4th 279, 309 (*Jones*).) " 'Whether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference [citations], failure to object seldom establishes counsel's incompetence.' " (*People v. Riel* (2000) 22 Cal.4th 1153, 1185.) Thus, "where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions." (*People v. Weaver* (2001) 26 Cal.4th 876, 926 (*Weaver*).)

Here, the appellate record does not disclose counsel's reasons for not objecting to Sergeant Griffin's testimony regarding the stolen motorhome and Ford truck. That testimony, however, helped explain the deputies' investigation of the case leading up to defendant's apprehension and arrest. At the same time, Griffin's testimony was neither inflammatory nor substantially likely to elicit an impermissible emotional response from the jury (Evid. Code, § 352; see *People v. Mendoza* (2011) 52 Cal.4th 1056, 1091–1092), and he acknowledged he did not know how defendant came into possession of the truck

or how the Florida-registered motorhome came to be in Del Norte County. Under these circumstances, defendant's counsel may reasonably have concluded not to object as a tactical matter.

Defendant additionally asserts his counsel was incompetent for not objecting to a portion of Sergeant Griffin's testimony estimating that 90 percent of all crimes in Del Norte County are drug-related and that many theft crimes are committed by drug users to support their habits. Relying on *People v. Robbie* (2001) 92 Cal.App.4th 1075, *People v. Castaneda* (1997) 55 Cal.App.4th 1067, and *People v. Martinez* (1992) 10 Cal.App.4th 1001, defendant argues such testimony was irrelevant to the charged burglary and highly prejudicial in that it profiled him as a thieving drug addict. We are not persuaded.

First of all, defendant's authorities addressing the misuse of profile evidence are inapposite because Griffin did not testify or otherwise imply that defendant was guilty of burglary because he fit the profile of a thieving drug addict in Del Norte County. Nor did the prosecution rely on such an inference in making its case to the jury. Indeed, defendant's own description of his drug use and actions at Fillman's home provided ample probative evidence of his intent, motive, and opportunity to burglarize.

In any case, the appellate record does not disclose counsel's reasons for not objecting to this brief portion of Sergeant Griffin's testimony, and the record suggests several reasonable explanations for counsel's omission. Notably, evidence that defendant was a drug addict and user was important to his defense. Defendant offered such evidence to explain why he initially went to Fillman's home (he and his friends were "coming down from their drugs," and he wanted to buy pills from his deceased friend's wife); why he grabbed Fillman's bottle of morphine pills as he left her house (morphine is the second best thing to heroin for a drug user, and he took the pills on the spur of the moment but denied having entered the house with the intent to steal); and why he incriminated himself during the videotaped interrogation (because the interrogation occurred while he was "sick and delusional" from withdrawal and could not "think straight").

Likewise, Sergeant Griffin's testimony that many theft crimes are committed by drug users appeared consistent with defendant's attempt to deflect responsibility for the theft of Fillman's belongings toward his three drug using friends, particularly Sinnott. Defendant's interrogation statements and trial testimony emphasized his long-standing personal friendship with Fillman's husband, his promise to look after Fillman, and his deep upset about Fillman's death. Thus, defendant's counsel may well have decided, strategically and quite reasonably, to forgo objection to the subject testimony because it was consistent with the implication that Sinnott possessed a motive and intent to commit burglary and theft that defendant—who was friends with Fillman and her late husband—did not share. On this record, we cannot assume counsel had no conceivable reason for failing to object to the perceived improper profiling evidence. (*Weaver, supra*, 26 Cal.4th at p. 926.)

In sum, the record on appeal does not demonstrate that counsel's omissions, considered individually or in combination, were professionally unreasonable. (*Jones, supra*, 17 Cal.4th at p. 309.)

#### **B. Defendant's Interrogation**

Sergeant Griffin testified that defendant was arrested on a parolee-at-large warrant and interviewed three hours after his arrest. Griffin testified as to the details of that interview, and a videotaped recording of the interrogation was introduced into evidence. Defendant claims the trial court should have excluded the videotape and Griffin's related testimony in light of a combination of circumstances, including the following: (1) Griffin knew the psychological and physical effects of drug withdrawal on addicts and was aware that defendant was "dope sick" at the time of the interrogation; (2) at the time of arrest, Griffin stepped on defendant's head and rammed it into the ground, resulting in a skinned nose and broken cartilage; (3) on a scale of 1 to 100, defendant was at 40 in feeling sick when arrested and at 80 when interrogated—he was hallucinating, unable to think straight, and his skin was crawling; (4) during the interrogation, Griffin and his partner repeatedly used the threat of a homicide prosecution to pressure defendant into admitting to a burglary; and (5) the two deputies continued to question defendant after he

told them he was tired and sick and made no effort to fathom the extent of his dope sickness. According to defendant, these circumstances rendered his statements in that interrogation coerced and involuntary.

Defendant, however, acknowledges that his counsel never objected to the admission of the videotaped recording or Sergeant Griffin's related testimony. But because defendant's counsel made no objections, "the parties had no incentive to fully litigate this theory below, and the trial court had no opportunity to resolve material factual disputes and make necessary factual findings." (*People v. Ray* (1996) 13 Cal.4th 313, 339.) Given these circumstances, appellate review of this claim has been forfeited. (*Ibid.*)

Alternatively, defendant urges that his counsel's omissions violated his constitutional right to effective assistance of counsel. Because counsel's reasons for not objecting do not appear on the record, defendant's ineffective assistance claim cannot succeed on appeal "unless there could be no conceivable reason" for counsel's omissions. (*Weaver, supra*, 26 Cal.4th at p. 926.) Here, it is entirely conceivable that counsel made no objections for tactical reasons.

The law governing the admissibility of an accused's confessional statements is well settled. "A criminal conviction may not be founded upon an involuntary confession." (*People v. Scott* (2011) 52 Cal.4th 452, 480.) "In determining whether a confession was voluntary, ' "[t]he question is whether defendant's choice to confess was not 'essentially free' because his [or her] will was overborne." ' " (*People v. Carrington* (2009) 47 Cal. 4th 145, 169 (*Carrington*).) Whether a confession was voluntary depends on the totality of the circumstances, including the length, location, and continuity of the interrogation, and defendant's maturity, education, physical condition, and mental health. (*People v. Cunningham* (2015) 61 Cal.4th 609, 642–643 (*Cunningham*).)

Here, the record does not reflect that the deputies engaged in coercive activity, which " 'is a necessary predicate to the finding that a confession is not "voluntary." ' " (*People v. Hensley* (2014) 59 Cal.4th 788, 814.) The videotaped interrogation does not show the deputies engaging in " ' "psychological ploys which, under all the

circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.” ’ ’ ” (*Cunningham, supra*, 61 Cal.4th at p. 643.) Having properly secured defendant’s waiver of his *Miranda* rights, the deputies were free to question him, which they did without threatening harm or falsely promising benefits. (*Carrington, supra*, 47 Cal.4th at p. 170.) In this regard, the deputies were permitted to, and did, ask tough questions, outline theories of the events, urge him to tell the truth, and confront, contradict, and debate with defendant. (*Ibid.*; *People v. Williams* (2010) 49 Cal.4th 405, 444; see, e.g., *People v. Spencer* (2018) 5 Cal.5th 642, 674.)

Significantly, the videotaped interrogation reflects that defendant appeared rational, physically coordinated, and sufficiently mentally alert to answer questions in a coherent manner. Fairly viewed, the videotape does not show that defendant was so impaired by drug withdrawal symptoms, disorientation, physical pain, or discomfort that he did not freely and deliberately choose to speak with the deputies. (See *Hensley, supra*, 59 Cal.4th at p. 814 [“ ‘while mental condition is surely relevant to an individual’s susceptibility to police coercion, mere examination of the confessant’s state of mind can never conclude the due process inquiry’ ”]; see, e.g., *United States v. Coleman* (9th Cir. 2000) 208 F.3d 786, 791 [heroin withdrawal symptoms—i.e., lethargy and physical discomfort—not enough to establish involuntariness of confession].)

Likewise, the record reflects none of other factors recognized as relevant to a finding of involuntariness. (See *Cunningham, supra*, 61 Cal.4th at p. 642.) There appeared nothing particularly coercive about the location or circumstances of the interrogation, which occurred at the Sheriff’s office in a single session lasting only one hour. Although defendant had restraints on his ankles, his hands were free and he was provided water at the outset of questioning. Defendant was an adult who demonstrated no difficulty understanding the deputies’ questions. Defendant also had several prior contacts with law enforcement and apparently was familiar with the criminal justice system, having suffered two prior felony conviction and served one prior prison term.

As indicated, defendant contends he made admissions relevant to the burglary count in response to the deputies’ repeated threats of a homicide prosecution. But the



videotape does not show that the deputies improperly threatened him with a potential homicide charge unless he admitted to burglary. Although the deputies referred to a possible homicide prosecution in their repeated efforts to get defendant to be truthful, it bears emphasizing that a homicide had not been ruled out at the time of the interrogation. (Cf. *People v. Badgett* (1995) 10 Cal.4th 330, 355 [“ ‘[t]here is nothing improper in confronting a suspect with the predicament he is in’ ”].) Moreover, one could reasonably infer from the videotape that defendant wanted to give his version of the relevant events after the deputies informed him they already knew all the facts from their investigation and from interviews with Sinnott and Amber. Additionally, when the deputies continued to accuse defendant of not being completely truthful, defendant demonstrated he was perfectly capable of exercising a rational intellect and free will by emphatically declaring, “I’m done here,” and stopping the interrogation at the one-hour mark.

Our review of the videotaped interrogation discloses that the deputies did not transgress the bounds of lawful conduct. Indeed, to the extent defendant complains that the deputies pressured him into falsely admitting the burglary, we note many of his admissions were corroborated by independent evidence including information obtained from Sinnott and the discovery of Fillman’s belongings on defendant’s person and in the motorhome where he lived.

In sum, it appears from the videotape that the statements given by defendant were the product of a rational intellect and a free will. The videotape also reflects the deputies conducted the interrogation in a manner that appeared lawful and unlikely to produce a false confession. Because defendant’s counsel could conceivably have made a tactical decision to forgo making objections that had little or no chance of success, we reject defendant’s ineffective assistance claim. (*Weaver, supra*, 26 Cal.4th at p. 926.)

#### **DISPOSITION**

The judgment is affirmed.

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Fujisaki, J.

WE CONCUR:

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Siggins, P.J.

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Petrou, J.

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